

Illegal Entry into the Federal Republic of Germany *de lege lata* et *de lege ferenda* – a Critical Interjection

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Lorenz Bode Sa 10 Dez 2016

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Illegal entry into Germany has led to penal proceedings since the first influx of refugees in 2015. Police investigations are opened against anyone entering without a passport or valid entry documents. Quite aside from the fact that the volume of such cases entails enormous administration overheads which are infeasible in light of limited resources, various aid agencies and others have [demanded reforms](#) to the German right of residence, with reference to the Geneva Convention on Refugees (GFK).

The coherences between illegality and criminality regarding the right of residence are very complex. Making the legal framework more comprehensible necessitates a closer look at the German Residence Act (AufenthG). Refugees entering German territory often lack a passport (or equivalent alternative), residence permit, or appropriate entry permission. Hence, in accordance with § 14 I AufenthG, entry is illegal. Unauthorized entry is prosecutable in accordance with § 95 I No. 3 AufenthG. In this context, §§ 95-97 AufenthG form the typical regulations for prosecution within criminal law. Unlike the criminal code (StGB), the elements of offence are not fully stipulated, but instead refer to other regulations from the AufenthG (e.g., § 11 AufenthG) or other legislation.

According to § 95 I No. 2 AufenthG and § 96 I AufenthG, unauthorized entry into federal territory, an unauthorized stay in federal territory, and incitement and abetment of these same, particularly by so-called “human traffickers”, are criminal acts. The basis for penal sanctions – with a significant sentence – is that these actions endanger the “control and limitation of immigration of foreigners under consideration of their ability to assimilate and integrate, as well as economic and political labor market interests” (cf. § 1 AufenthG) and undermine the right of residence. If the illegal entry or stay are connected to organized operations and if firearms are used or a smuggled person dies, the expected sentence will be [significantly higher](#).

A residence permit is a limited or unlimited permit to reside in Germany or to enter the country (cf. § 4 AufenthG). Anyone residing in Germany without the required permission is obliged to leave the country (cf. § 50 I, II AufenthG).

This conflict places the relationship between penal provisions and German asylum law under repeated strain. This judicial practice not only leads to practical problems; it should also be regarded critically in light of the Geneva Conventions, of which Germany is a signatory. According to Art. 31 I GFK, in conjunction with § 95 V AufenthG, no refugees shall be prosecuted who directly originate from a region where their life or freedom were at stake or who enter Germany without permission and immediately report to the authorities. The idea behind this regulation is that refugees cannot be charged for violating entry regulations if this violation was the only way to obtain safety from persecution. The significance of asylum law should hence predominate.

However, it must be considered that Art. 31 I GFK in conjunction with § 95 V AufenthG only cover the offence of illegal entry. The culpability of further offences is inviolate. Furthermore, Art. 31 I GFK in conjunction with § 95 V AufenthG cannot be used as justification, merely as a repeal. Hence the culpability of the person entering illegally is determined, and is then (at best) retrospectively repealed. This culpability has no legal consequences, thus the need for this temporary penalization due to entering under Art. 31 I GFK stands on shaky ground, even when it comes to prosecution based on participation.

Generally, all detected offences related to the delict of § 95 AufenthG (e.g., falsification of documents, smuggling or entering despite entry prohibition) are prosecuted, even when the flow of refugees increases significantly, as it did in 2015. However, this practice makes no sense if people are sentenced without wrong-doing and file a petition for asylum procedure. *De lege lata*, there is no legal possibility for refugees to enter Germany and use their right to apply for asylum. They are also placed under insecure legal status: the legal status of persons

entering via land is currently unclear, even though this is increasingly common in practice. In this case, it is unclear whether foreigners who enter Germany via a safe third country meet the criteria for being a refugee as stipulated in Art. 31 I GFK. Likewise, the enormous administrative effort and the significant number of instances where prosecution is dropped do not support sanctioning persons who enter illegally and subsequently petition for asylum. The right of residence [desperately needs to be reformed](#). *De lege ferenda*, it makes sense to eliminate the discriminating legal status provided under Art. 31 I GFK and “de-criminalize” affected refugees. This is the only way to achieve the welcoming culture desired by politicians. The fact that refugees are liable to prosecution by entering Germany and filing a petition for asylum is unacceptable.

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